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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 429.

D. GINSBERG & SONS, INC.,

Petitioner,

—against—

JOSEPH POPKIN.

(Matter of Foster Construction Corporation, Bankrupt.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 50 F. (2d) 693.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered July 1st, 1931 (R. 43). The petition for writ of certiorari was filed October 1st, 1931, and was granted November 2nd, 1931 (R. 44). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code (28 U. S. C. A. 347).

Question Presented.

Can the District Court, sitting in Bankruptcy, issue a warrant of arrest against the officer of a bankrupt corporation, *not himself a bankrupt,* to secure his attendance for the purpose of examining him concerning the property of the bankrupt corporation, in contravention of provisions of Section 9 (b) of the Bankruptcy Act, in that:

(a) The Application was made more than six months after the qualification of the Trustee;

(b) The Application was made not by the Trustee but by a single creditor;

(c) The Application was not supported by the *affidavits of at least two persons* that the officer sought to be arrested was about to leave the district in which he resided or had his principal place of business, to avoid examination;

(d) Where, on the contrary, it affirmatively appears from the petition upon which the warrant of arrest was granted that the person sought to be arrested was not then within the district; and the only evidence presented as to residence is to the effect that he resided in another district.

Statutes Involved.

The statutes involved are Sections 1 (4), 2 (15), 7 (a), 9 (b) and 21 (a) of the Bankruptcy Act of 1898, and Section 261 of the Judicial Code. They appear in full in the appendix hereto.

Statement.

Following are the essential facts as they appear from the record: On September 23rd, 1929, an involuntary petition in bankruptcy was filed against Foster Construction Corporation in the United States District Court for the Eastern District of New York. Sometime between that date and July 1st, 1930, that corporation was adjudicated a bankrupt, and on the last named date a Trustee was appointed and he duly qualified (R. 2). The respondent Joseph Popkin was the president of the corporation at the time the petition in bankruptcy was filed against it.

On December 4th, 1930, the petitioner, D. Ginsberg & Sons, Inc., obtained from the District Court for the Southern District of New York, an ancillary order, variously referred to as a writ of *ne exeat* and a warrant of arrest, which ordered the respondent to appear before a Special Commissioner in bankruptcy in the last named district, and also directed the United States Marshal to take the respondent into custody and bring him forthwith for examination before the Judge making the order, or, at his option, cause him to give bail in the sum of Ten thousand ($10,000) Dollars that he, the respondent, "will not depart from or go, or attempt to depart from or go, beyond the territorial jurisdiction of this Court without its leave" (R. 4-5).

The respondent was taken into custody under this order, and was released on furnishing bail in the sum of Ten thousand ($10,000) Dollars. He then moved to vacate the order, but this motion was denied. The opinion of Judge Woolsey denying this motion is printed in the Record at pages 29-34. On appeal to the Circuit

Court of Appeals for the Second Circuit, that court reversed the last-mentioned order and directed the District Court to grant the motion to vacate (R. 43-44).

It affirmatively appears from the moving papers that at the time of the issuance of the writ of *ne exeat* or warrant of arrest by the District Court for the Southern District of New York, the respondent was not within that District (R. 6). It nowhere appears in the record where the respondent had his business office. From the fact that he was the president of the bankrupt, it may be fairly assumed that his place of business at the time of the filing of the bankruptcy petition was in the Eastern District of New York. The only proof as to residence is that in the latter part of January 1930, the respondent lived within the territorial jurisdiction of the Eastern District of New York (R. 27-28). The petition on which the writ or order was made states that the last place where the respondent was seen was the City of Jersey City, in the State of New Jersey, "where Joseph Popkin apparently went to spend last night". This petition also contains the following additional statement which seems relevant:

> "Your petitioner does not know whether Joseph Popkin will return to New York City or will return to Jersey City" (R. 6).

Statements and Allegations of Which There is No Proof.

The Record which consists of various petitions made by the petitioner-creditor is full of statements and allegations of which there is no proof; and as to some of which there is, indeed, proof to the contrary in this

very record. Unfortunately, the District Court, laboring under what we believe to be an entirely mistaken conception of the law applicable to this case, assumed that these various allegations were equivalent to proof of the facts sought to be charged, and its decision was based on that assumption. These matters will be discussed more fully further below. We shall, therefore, only summarize here our contentions in that respect:

(a) There is no *proof* in the record that the respondent was a *fugitive* either for a long time or for any time.

(b) There is no *proof* in the record that the respondent had converted the sum of One hundred thousand ($100,000) Dollars or any other sum belonging to the bankrupt corporation.

(c) There is no *proof* that the respondent has disobeyed any subpoena for his examination or any other order or mandate of any court.

Summary of Argument.

1. The Federal Courts have no inherent power to issue orders of arrest, or writs of *ne exeat*. This power did not exist under the common law of England. *A fortiori*, it does not exist in the Federal Courts, in which there is no such thing as a criminal common law, nor any inherent right to issue punitive orders. All Federal Courts have only such power with respect to these matters as is specifically granted them by statute.

2. The power of any Federal Courts to issue writs of *ne exeat* is governed by Section 261 of the Judicial Code; and the power of a Bankruptcy Court to issue an order of arrest in aid of an examination is given, defined

and *limited,* by Section 9 (b) of the Bankruptcy Act. That section limits the power of the Bankruptcy Court to issue such orders of arrest—

(a) *As to the person* against whom such order may be made, by prescribing that such order can only be made against *the bankrupt;*

(b) *As to the time* within which it may be made, by providing that such order can only be made between the time of the filing of the petition and one month from the appointment of a Trustee;

(c) *As to the length of time* of incarceration, by providing that the person against whom the order runs can only be detained for a period of ten days;

(d) *As to the papers upon which it can be made,* by providing that before the order can be made there must be presented to the Court making it proof of certain matters, and that the proof must be in the form of *affidavits made by two persons.*

3. That Section 2, subd. 15 of the Bankruptcy Act does not in any way enlarge the powers of the District Court with respect to such orders. That the last named subdivision deals with *general* matters, not specifically covered by other parts of the Bankruptcy Act, or any other existing law; and is intended to cover minor matters which could not be dealt with in the Bankruptcy Act in detail within the scheme of that Act, and particularly with reference to the administration of bankrupt estates which comes into its custody. That, in any event, no power derived from that sub-section can be exercised *contrary* to specific limitations upon that power contained in other portions of the Act itself.

4. That an order such as is involved herein could only be made upon the application of the Trustee, after one has been appointed.

5. That the District Court was, therefore, clearly without power to make the order reversed by the order appealed from, for the reasons—

(a) That the respondent is not a bankrupt;

(b) That the order was made long after the expiration of one month from the appointment and qualification of the Trustee;

(c) That the application was not made by the Trustee;

(d) That there was no proof by *affidavits of two persons* of the matter of which proof must be presented to the Court before such order can be made;

(e) That there was no *proof* of any kind of the matters which must be proven to the Court before such an order may be made;

(f) That as to some of these matters there was, indeed, proof, or at least allegations by the petitioner, to the contrary.

ARGUMENT.

I.

The Federal Courts have no power to make orders of arrest or to issue writs of *ne exeat* except as such power is specifically given by statute.

In the argument in the District Court upon the application to vacate the order of December 4th, 1930, that order was referred to as a writ of *ne exeat*. It was thus that the present petitioner, the respondent in the District Court, sought to avoid the force of Section 9 (b) of the Bankruptcy Act which specifically limits the powers of the District Court in the issuance of orders of arrest; and it was thus that the petitioner herein sought to excuse its failure to comply with the provisions of that section with respect to the character and nature of the *proof* which must be presented to the Court before an order of arrest can be made by the Bankruptcy Court under the stringent provisions of that section. The order of Judge Inch of the Eastern District Court, under which the application was made to the Southern District Court, for the issuance of the warrant or writ against the present respondent did not give the petitioner herein the right to apply for an order of arrest, but only for "orders *ne exeat*" (R. 10). And it was upon that theory that the application of the respondent herein (the petitioner in the District Court) to have that writ or order vacated was denied by Judge Woolsey of the Southern District Court. Judge Woolsey begins his opinion with a statement that the application to Judge Goddard, who made the order of December 4th, 1930, in the Southern District, was authorized by the order of Judge Inch of

the Eastern District made December 3rd, 1930. In stating what the last mentioned order authorized the creditor to do, he says that it authorized him to apply

> "For orders *ne exeat* directed to the Marshal of the Southern District of New York" (R. 30).

And, in concluding his opinion denying the present respondent's motion to vacate Judge Goddard's order, Judge Woolsey says:

> "The order issued by Judge Goddard, even if it be not regarded as a strictly canonical *ne exeat* order is in the nature of such an order" (R. 34).

On this appeal, however, the petitioner herein has evidently abandoned that position, as there is not a single reference to writs of *ne exeat* in the brief submitted on behalf of the petitioner.

Under these circumstances, it is rather difficult for counsel to speak with certainty as to just what the order involved really is—whether to treat it as a writ of *ne exeat,* as it was treated by the Judge who made it and the Judge who sustained it, as well as by counsel for the petitioner in the District Court, or as a warrant of arrest, as it is treated by opposing counsel on this appeal. In order, therefore, to escape the force of any theory upon which the order might be sought to be sustained, we shall discuss both aspects, although we shall direct our principal attention to the theory upon which it is sought to sustain the order in the brief of counsel for the petitioner on this appeal.

It is now well settled that there is no criminal common law of the United States (*U. S.* v. *Coolidge,* 1 Wheat. 415). In fact, there is no such thing as a common law of the United States whether criminal or civil. But the

latter question need not be discussed here since clearly orders of arrest and writs of *ne exeat,* being in derogation of liberty, are penal or punitive measures, which cannot be exercised by the Federal Courts except where granted by statute. But even if it were held that the Federal Courts can exercise both the civil and criminal common law as it existed in England at the time of our Declaration of Independence, it would still be true that the Federal Courts have no power to make orders of arrest or issue writs of *ne exeat,* except as such power is specifically granted to them by statute, for no such power existed at common law in England.

As to warrants of arrest, they being concededly criminal in their nature, the matter needs no further argument. As to writs of *ne exeat,* it is sufficient to say that this writ originally was a writ of High Prerogative, used only for purposes of State, and came but gradually to be applied in the interest of private parties. It was and is the settled law of England that this writ is of statutory origin, and being against common right and the liberty of the subject, the grant of power to issue the same must be strictly construed. It must not, therefore, issue except under such safeguards as are provided by the statutes creating the power and the rules which the Courts have imposed upon themselves in exercising it.

Coke, 3rd Institute, Cap. 84;
Cock v. *Ravie,* 6 Ves. 283;
Shaftoe v. *Shaftoe,* 7 Ves. 171;
Jackson v. *Petrie,* 10 Ves. 165;
Roddam v. *Hetherington,* 5 Ves. 91;
Whitehead v. *Patridge,* 3 Swanstron 365;

Oldham v. *Oldham*, 7 Ves. 410;
Etches v. *Lance*, 7 Ves. 417;
Hamray v. *McEntire*, 11 Ves. 54;
Seymour v. *Hazard*, 1 Johns. Ch. R. 1;
DeRivafinoli v. *Corsetti*, 4 Paige 264;
Graham v. *Stuckem*, 4 Blatchf. 50, 10 Fed. Cases 945 (No. 5,677);
Gernon v. *Boecaline*, 2 Wash. C. C. 130.

According to Coke, it is the natural right of a free-born Englishman to move freely about and go wherever he pleases, including out of the kingdom, except when prohibited by statute; and the statutory prohibitions relate only to clergymen and knights. The reasons for these statutes need not be gone into here, except that it must be borne in mind that the exceptions were based on the assumption that the departure from the country is either for a treasonable purpose or otherwise in pursuance of some illegal design or intent. Where the reason does not exist, the statutory prohibition does not apply.

> "Mich. 12 & 13 Eliz. It was resolved by all the justices (except two) that a merchant of London departing the Realm, to the intent to live freely from the penalty of the law, and out of his due obedience to the queen, and not for any merchandise, that it was no contempt to the queen, for merchants were excepted out of the said statute of 5R. 2, cap. 2, and by the common law merchants might passe the sea without license, though it were not to merchandise."
>
> Coke, 3rd Inst., cap. 84, page 180.

Beames, in his well known work on this subject, says:

> "It (the writ *ne exeat*) appears to have been unknown to the ancient Common Law, which, in the freedom of its spirit allowed every man to depart the Realm at his own pleasure."
>
> Beames, *Ne Exeat Regno,* page 7.

In the English practice as it existed before the time of the separation of this country from the British Empire, the power of the Court of Chancery—the only court which could issue the writ—to issue the same was greatly circumscribed, so that it could issue only in a few well-defined cases, and there was no *general* power to issue it. These rules were clearly stated in a series of decisions made by Lord Chancellor Eldon and other Chancellors in the early part of the Nineteenth Century; and were to the effect that it would only issue in case of a liquidated demand *actually due,* of an *equitable* nature, under circumstances which would entitle the plaintiff to have the defendant put under bail in an action at law.

In the first case cited, the writ was refused by Lord Eldon in a case where it would otherwise have been proper, because the claim was not *actually due;* the claim being based on the fact that the complainants had gone surety for the defendant, and, although there was a breach by the defendant of the contract under which the complainants went surety, the complainants had actually not paid anything under their bond.

In the second case cited, the Lord Chancellor held that, although a writ will properly issue in an alimony case, it will only be issued for the amount of alimony

then actually due, and not for any alimony that may become due in the future, saying:

> "In the ordinary case the Court never marks the writ for more than is due. Certainly the case of alimony is stated as a case of exception: *but it is wrong.*"

The same rule prevailed in this country after its separation from England. It was applied by Chancellor Kent in *Seymour* v. *Hazard, supra,* and by Chancellor Wolworth in *DeRivafinoli* v. *Corsetti, supra.* The same rule applied in the federal cases, as is shown in the last case cited above.

It is thus clear that even in our State courts, which have inherited the general equity jurisdiction of the English Court of Chancery, there is no general power to issue writs of *ne exeat,* and that their issuance is very rigorously circumscribed, and that these rules make it inapplicable in a case like the case at bar, if it were pending in a State court of equity, even in the absence of statutes regulating the practice.

But our court is not a State court, which has *plenary* equity powers; and the issuance of the writ *is* regulated by statute. That statute is Section 261 of the Judicial Code, which specifically limits the issuance of writs of *ne exeat* in two ways: first, as to person against whom it may be issued, by making it issue only against *defendant;* and, second, as to the case in which it would issue, by making the only case in which it would issue a threatened departure *from the United States.*

Indeed, it was held that even at common law it cannot issue against a complainant on a counter-demand set up by a defendant, even though the circumstances

were such that it would have been proper to issue the same if the defendant had brought an independent suit against the complainant. *Davidor* v. *Rosenberg,* 130 Wisc. 22. It goes without saying that it cannot issue against third parties, even though they be officers of a defendant corporation.

In the *Gernon* case, it was specifically held by Mr. Justice Washington of the United States Supreme Court, while sitting as Circuit Judge, that federal judges have no inherent jurisdiction to issue writs of *ne exeat* or *orders of arrest.* It was, therefore, held, that in the absence of specific authority to district judges to issue such writs, such judges could not issue the same, when sitting as circuit judges, although circuit courts did have specific authority granted to them by statute. *Gernon* v. *Boecaline,* 2 Wash. C. C. 130.

To the same effect: *Lowenstein* v. *Biernbaum,* 15 Fed. Cases 782 (No. 8, 641a).

In the same case, it was expressly held, and, indeed, admitted by counsel for the party who had obtained the writ, that the writ could not issue where the party is merely about to leave the jurisdiction of the court, but only where he is about to leave the *United States.*

Turning now from writs of *ne exeat* to orders of arrest, we shall find that, if anything, the rules with respect to the latter are even more stringent than with respect to writs of *ne exeat.* The reason is obvious: Whatever difference of opinion there may be as to the origin of the power of the English Court of Chancery, which our State courts are supposed to have inherited, with respect to writs of *ne exeat,* there can be no ques-

tion that orders of arrest are always and everywhere, in this country, governed by statutory provisions, which must be strictly adhered to. We have already quoted Mr. Justice Washington to the effect that federal courts have no inherent power to issue *orders of arrest*. *Gernon* v. *Boecaline, supra.* We may now proceed to examine the existing statutes with respect to such orders.

II.

The respondent does not come within the provisions of the Bankruptcy Law expressly governing the subject of orders of arrest as aid to examination.

Section 9-b of the Bankruptcy Act regulates and expressly *limits* the power of the bankruptcy courts to issue orders of arrest in aid of examination, and we have already shown the ways in which that power is limited. It is clear that those limitations exclude the respondent herein from the purview of that section, and that no order of arrest, therefore, could be granted against him.

At the very threshold of the inquiry, we are confronted with the fact that the respondent herein is concededly not a bankrupt. This is so clear that only a brief reference to the authorities should be sufficient.

Field v. *United States*, 137 Fed. Rep. 6;
Kaufman v. *United States*, 212 Fed. Rep. 613.
In Re Blargolies 266 Fed. 203.

In the first case cited, Circuit Judge Sanborn said:

"The plaintiff in error, who was not a bankrupt but who was vice president and one of the

directors of the Brown-Rollosson Company, a corporation which was a bankrupt, was indicted, a demurrer to the indictment was overruled, and he was convicted under section 29b of the bankruptcy law of July 1, 1898, of the offense of having knowingly and fraudulently concealed property which belonged to the estate of the corporation in bankruptcy from the trustee. Section 29b reads:

> 'That a *person* shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy.' * * *

The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the bankruptcy law broadens the meaning of section 29b so that it includes the officers of a bankrupt corporation. * * * That clause reads:

> ' "Persons" shall include corporations except where otherwise specified, and *officers*, partnerships and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations.'

A careful reading of this clause, however, in connection with the terms of section 29b, convinces that it can have no effect to extend the

terms or broaden the true interpretation of the latter subsection. * * * The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its trustee is clearly within the mischief of this sub-section, and therefore within its true interpretation, *is unworthy of serious consideration.* A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified."

And in the second case cited, Circuit Judge Rogers said:

"It may be conceded that the defendant could not be convicted under section 29b of the Bankruptcy Act. That section applies only to one who has 'knowingly or fraudulently concealed while a bankrupt or after his discharge'. *As the defendant is not alleged ever to have been a bankrupt the section is without application to him.*"

The last case cited is interesting in more than one respect. Not only did the learned Court in that case adopt as conclusive and follow the decision in the *Field* case, but the case shows that such was the opinion of the entire profession, at least since the decision in the *Field* case. For the defendant, who was the president of the bankrupt corporation, and was charged with having sold its property and converted its assets to his own use, was not indicted for concealing assets, as in the *Field* case, but for *aiding and abetting* the defendant corporation in concealing its assets from the Trustee. But the case shows more than that. It shows that the Bankruptcy Act when supplemented with the other

federal statutes, is perfectly sufficient to take care of all contingencies which may be expected to arise in the course of the administration of bankrupt estates, including cases of peculation by officers of bankrupt corporations or other offenses on their part.

We think that our federal courts are not ready to adopt the doctrine that "necessity knows no law", and that they can resort to illegal practices whenever a judge thinks that a necessity has arisen which requires the exercise of a power not granted by statute. But even if we were to succumb to the modern hysteria which clamors for the disregard of personal rights protected by constitutional and statutory provisions because of alleged necessity, we respectfully submit, that there is no such necessity at all in the present instance, or in the class of cases to which it belongs. The two cases just cited illustrate the difference between the attempt to unwarrantably extend statutory provisions in order to meet an imaginary necessity, and the proper use of powers actually granted by statute to meet actual situations. The first must, of necessity, result in failure; while in the second, success is assured. In the *Field* case, a possibly guilty defendant escaped, because an improper attempt was made to stretch the provisions of Bankruptcy Law to cover a case which it clearly does not cover; while in the *Kaufman* case a similar criminal was brought to book because the proper statutory provision was put into motion. In the *Field* case, which was decided in the early years of the present Bankruptcy Law, there was some excuse for the error made by those who attempted to put an improper interpretation on the word "bankrupt" as used in the Bankruptcy Act. There is none such at this late day. With the *Kaufman* de-

cision more than fifteen years old, no claim can be made that there are no express provisions in the federal statutes sufficient for the apprehension and punishment of a criminal such as the respondent herein must be if the petitioner's claims are to be believed.

The truth is, of course, that these claims are wholly unfounded; which is the real reason why resort is made to an improper procedure, and an attempt made to give statutory provisions interpretations which they cannot bear. This aspect of the case will be discussed more fully under point "V", where we intend to discuss the papers upon which the order of arrest was granted.

There is no occasion to discuss at length the further limitations of Section 9-b upon the power to issue orders of arrest, namely, the failure to make the application within the time prescribed in that section, or upon proof by the affidavits of two persons, as is also required by that section, for, concededly, those provisions of the statute were disregarded,—upon the theory that the order was not issued under that section at all, but under Section 2, subd. 15, which is supposed to *enlarge* the powers of the court beyond the powers granted to it by Section 9-b. We may, therefore, turn to that question.

III.

Section 9-b of the Bankruptcy Act specifically *dealing with* and *limiting* the power to grant orders of arrest is not enlarged by the general provisions of Section 2, subd. 15.

There is nothing new in the attempt to bolster up the improper use of powers specifically regulated by statute by resort to some vague provisions of another

statute. In fact that was exactly the situation in the *Field* case, cited above at length. The Court in that case disposed of it by holding that the *general language* must be read in connection with the *specific provisions* governing the subject under consideration. And the Court was merely applying the general principle of law that when two statutes apply to a case, one general and one specific, the general statute must be read in the light of, and is *limited by,* the provisions of the specific statute governing the situation.

It is contended on behalf of the petitioner in this court that the provisions of Section 2, subd. 15, give the Bankruptcy Court *additional* powers. There is serious doubt about that, and there is very respectable authority, at least in the domain of constitutional law, that such general clauses do not give any additional power—and the use of the words "in addition" in that subdivision would make no difference. However, we need not here enter upon this interesting question, as it really does not affect the situation in our case. For clearly, the words "in addition" cannot possibly mean *"contrary to"*, which they would have to mean in order to give them the effect contended for by those who think that orders of arrest may be made by the Bankruptcy Court *in disregard of the specific limitations* contained in Section 9-b. One might as well argue that by reason of the so-called "necessary and proper" clause of the United States Constitution, Congress may make a law whittling away the protection to personal liberty provided by the specific provisions of the same Constitution defining what is treason against the United States and how it must be proved. All of this would seem so elementary as not to require, or even permit, of discussion but for the fact

that the District Court *did* disregard these specific provisions, and offered as an excuse that the order of arrest herein is a "non-canonical" writ of *ne exeat*, and need not, therefore, comply with the law governing either an order of arrest or a writ of *ne exeat*. We shall, therefore, quote some authority:

> "The right to demand bail, it is argued, is given by section 2, subd. 15, of the act; but that provision is an authority to make orders generally in addition to those specifically provided for, and to give it the effect here demanded would be inconsistent with section 9b, *where the conditions under which it may be required are specifically defined, and do not include a case like this.*"
>
> *U. S. ex rel. Kelley* v. *Peters*, 166 Fed. Rep. 613.

See also,

Davidor v. *Rosenberg*, 130 Wisc. 22.

The question involved in the case just cited was similar to that in the case at bar, in that there, also, it was sought to enlarge the powers of the court by a general provision contained in a statute. There was this difference, however, between the two cases, which makes our case a much stronger one against the attempt to enlarge the powers of the court: In the case cited the power itself was not conferred by statute, which existed at common law, which the statute merely confirmed. And there was no specific *limitation* upon the powers of the court. Nevertheless, the Supreme Court of Wisconsin, which has been referred to in a well-known work as "A Great Court", and deservedly so, held that the general statute cannot be held to have enlarged the

powers of the court, and that the power must be exercised under the traditional limitations in the absence of *specific additional* powers. Speaking for that court, Judge John B. Winslow, afterwards Chief Justice thereof, said:

> "It (the writ of *ne exeat*) is issued only against a debtor who was a party to the suit, not against a third person not a debtor whether he be a party to the suit or not. The ancient writ always recited that it appears that the defendant is indebted to the complainant and designs quickly to go beyond the seas. Beames, *Ne Exeat,* 18. Nor is this latter rule in any way changed by the terms of sec. 2784, *supra,* which provides that the writ may be granted to prevent 'any person' from leaving the state, for the obvious reason that the following section provides that no writ shall be granted unless it appears that 'sufficient grounds' exist therefor. Sufficient grounds means, as we have seen, grounds sufficient under the principles of the common law, and no grounds are sufficient under those principles unless it appears that the party is a debtor."

Davidor v. Rosenberg, 130 Wisc. 22.

In that case, the writ had been issued against the complainant and a woman named Dawson, not a party, on a counterclaim by the defendant, supported by affidavit to the effect that the party debtor had transferred to the Dawson woman all of his property without consideration, in fraud of his creditors, and that both were about to leave the state. The decision of the Supreme Court was to the effect that the writ had been issued improperly against both, for the reason that *neither was a defendant.*

The matter was put as succinctly as possible by Judge Clark, speaking for the Circuit Court of Appeals for the Sixth Circuit (Circuit Judge Lurton, later Mr. Justice Lurton of the Supreme Court, being of the Court), in the case of *In re Hassenbusch,* when he said:

> "No discussion could make this plainer than a simple reference to the terms of the two provisions of the statute, from which it is obvious that there is no substantial ground for the proposition that the broader powers conferred on the District Court in the Fifteenth Subdivision of jurisdiction *do not extend or enlarge a jurisdiction separately dealt with, and specifically and carefully defined and limited like the power contained in clause (b) of Section 9.*"
>
> *In re Hassenbusch,* 108 Fed. Rep. 35.

IV.

The order of arrest involved herein was improperly granted on the application of a single creditor.

It is respectfully submitted that the order of arrest involved herein could be granted only on the application of the Trustee in bankruptcy of the bankrupt corporation, except, possibly, before the appointment of such Trustee.

It is well settled that in matters relating to the administration of the estate in bankruptcy generally, and the protection of the general body of creditors, which includes all such proceedings as may be neces-

sary to reduce the estate to possession, or to follow up its assets, or to initiate any proceedings looking to any of these things, the Trustee in bankruptcy represents not only the estate as such but the general body of creditors, and he is, therefore, the only one entitled to so proceed. This rule is well founded, as otherwise there would be confusion in the administration of the estate, which would result in harm to the entire body of creditors, and might also lead to injustice to the bankrupt, in that each creditor might harass him separately for the purpose of gaining a personal advantage, a practice, unfortunately, only too common in bankruptcy courts.

In re Lewensohn, 121 Fed. Rep. 538;
In re Rogers-Johnson Building Co., 30 Fed. (2nd) 359.

In the first case cited, the unanimous Circuit Court of Appeals for the Second Circuit, speaking through Judge Wallace, said:

> "The petition of review presents a question of practice of considerable importance. The order of the Court below has sanctioned a proceeding by one of the creditors of the bankrupt instituted *without the concurrence of the trustee* to re-examine the claim of various other creditors, which have been proved and allowed. Such a practice, when the estate and the interests of all the creditors are represented by the trustee, does not subserve any necessary purpose, and *opens the door to great abuse* * * *. The trustee represents every creditor * * *, *if the trustee should without sufficient reason, refuse to proceed, the Court by its order could compel him to do so, or remove him*

> *for disobedience.* * * * It has been held that under the present Act that a creditor cannot prosecute an appeal from the judgment of a court of bankruptcy allowing the claim of another creditor, and that *the trustee is the only party who can do so.*"
>
> *In re Lewensohn,* 121 Fed. Rep. 538.

An application for a writ of certiorari to review the decision in the *Lewensohn* case was denied by this Court on April 27th, 1903. This Court thus approved by implication the rule laid down by the Circuit Court of Appeals for the Second Circuit, as stated by Judge Wallace; and that has been the accepted opinion of the profession ever since.

This position of our Courts has been reiterated in a recent case by the Circuit Court of Appeals for the Eighth Circuit, in a case where certain creditors of a bankrupt sought to appeal from an order made by the Referee in bankruptcy from which the Trustee refused to take an appeal. In denying that right, the Court said:

> "This is an appeal by certain creditors of a bankrupt estate from an order made by the Court below, denying such creditors the right to petition for a review of certain orders made by the referee in bankruptcy. A motion to dismiss the appeal has been filed primarily upon the ground that minority creditors have no absolute right to appear for the estate, *after a trustee has been appointed.* * * * The question presented is clear-cut. Does a single creditor have the absolute right to petition for a review from an order made by a referee in bankruptcy? But little help can be found in the act or the general

orders in aid of the solution of the question as to who shall prevail in the event the trustee and a creditor disagree as to procedure. * * * *However, in other sections of the act, as to controversies with third parties, the trustee alone is recognized as representing the bankrupt estate.* When bankruptcy comes, the identity of the individual creditor is merged in a class. He may vote for a trustee, but if he is outvoted, a trustee not of his own choosing acts for him. He votes to disapprove a composition, but a majority and the court can compel him to take it. He does not believe a liquidated claim should be compromised, but Section 27 of the act gives *that power to the trustee and the court. Provision is made for the removal of a faithless trustee, but, as long as he is trustee, he speaks for all the creditors. Without some such system of representation the whole law would fall of its own weight.*"

In re Rogers-Johnson Building Co., 30 Fed. (2nd) 359.

But aside from the general rule requiring all applications in which the entire body of creditors is interested to be made by the Trustee, there is in this case, we respectfully submit, *specific statutory direction* for such course in the provisions of Section 9-b. In discussing the limitation as to the time within which such an order may be made, we have pointed out the provision of Section 9-b which says that such an order can only be made between the time of the filing of the petition and the expiration of one month *from the appointment of the Trustee.* We respectfully submit that this provision is not only a limitation *as to time when,* but also

as to the party *who* may make the application. It will be noted that the limitation is not as to any period of time from the filing of the petition, but *from the appointment of the Trustee.* Such a limitation as to the time would be absurd if the intention of the framers of the law had not been that it is the trustee who is to make the application. We do not mean to say that the limitation is absolute in the sense that it cannot be made by a creditor *before* the appointment of a trustee. But it is clear that *after* the appointment of a trustee, it must be made by the trustee. Hence, the period of limitation starts running from the appointment of the trustee. This is the only theory which gives sense to the provision.

It is argued, however, that in this case, this rule should be suspended, and a different rule should apply here from any other bankruptcy case. The basis for this contention is an allegation in the petition upon which the order of arrest involved herein was granted that it would have been useless to ask the Trustee to proceed in the premises, coupled with aspersions on the character of the Trustee, a member of the Bar. And counsel invokes the rule applicable in stockholders' suits that where a corporation is controlled by the adverse party and it would be manifestly useless to apply to the corporation to bring the suit, the stockholder may proceed without making such application.

The District Court, proceeding upon the erroneous assumption that the allegations in the petition are equivalent to proof of the facts charged, upheld this contention. We show further below that the theory upon which the District Court proceeded as to the effect of the allegations in the petition was entirely erroneous; and that the charges against the Trustee were entirely

unproven and their correctness highly improbable. Here, we desire to respectfully submit that the rule invoked has no application to the present situation. And for a very good reason: A stockholder who desires to bring a suit to protect the rights of a corporation against officers or directors who are looting its treasury or improperly disposing of its assets, has no other remedy except to bring the very suit which he has brought. For no single stockholder, nor many stockholders together, as long as they constitute a minority, and in many cases even where they constitute a majority, can bring an action to remove the officers. In many jurisdictions, such an action can only be brought by the Attorney-General on behalf of the State. But the situation is entirely different in the case of a Trustee in bankruptcy *who is an officer of the court and always subject to removal by it.*

Order XIII of the General Orders in Bankruptcy specifically provides that the appointment of a trustee may be approved or disapproved by the referee or by the judge; and that the trustee is removable by the judge. A trustee who does not do his full duty can be ordered by the court to do it, and may be removed summarily on cause shown. If the charges against the Trustee here were true, he certainly would have been removed on application to the District Judge, for which there was ample time since the appointment on July 1st and the petition for the order of arrest, more than five months later. Also, the alleged friendliness of the Trustee to the respondent was known even before his appointment, as the petition specifically says that the petitioner and other creditors had objected to the appointment of the Trustee but that they had been outvoted (R. 7). In this connection, it should be borne in mind that the referee has a right at the election of a trustee to reject

votes on the ground that they are in the interest of the bankrupt.

In re Van De Mark, 175 Fed. Rep. 287.

In addition, as we have already pointed out, under G. B. O. XIII, both the Referee and the District Judge have a right to disapprove the appointment of the trustee no matter how many votes he received. We must, therefore, assume that either both the Referee and the Judge considered the objections to our Trustee groundless, or that the creditors did not dare to submit their objections to the test of an inquiry either by the Referee or the Judge.

Because of all of these considerations, which our case fairly typifies, the courts have held that the rule invoked by analogy from stockholders, suits do not apply to cases where creditors attempt to bring proceedings over the head of the Trustee. And in the case last cited, it was expressly held that such charges in a petition are merely conclusions of the pleader, and are not to be regarded as proof of the facts alleged.

> "In bankruptcy proceeding, allegations that trustee had failed and refused 'to protect the interests of the said bankrupt estate, but is actively co-operating with said mortgagees to deprive the general estate in bankruptcy' of rent-moneys, held conclusion of pleader."
>
> *In re Rogers-Johnson Building Co.,* 30 Fed. (2nd) 359.

V.

The papers upon which the order herein was made were insufficient, and, therefore, did not give the Court jurisdiction.

We respectfully submit that the papers upon which the order of arrest herein was granted were insufficient with respect to the *proof* required by law to give the District Court jurisdiction, and the order should have been quashed or vacated upon the application of the respondent even if this had been a proper case for the making of such an order.

The District Court having no inherent jurisdiction to issue orders of arrest, and its power being entirely statutory, its jurisdiction depends upon the presentation of the proof which is the condition upon which the exercise of the power is granted. The proof required by the statute is stated in terms which are simple and unambiguous, and which concededly have not been complied with. There is no proof by the *affidavits of two persons.* In fact, *there is no proof by affidavit at all*—all we have is allegations in a petition made by a person who concededly knows nothing of his own knowledge. But, we respectfully submit, quite aside from the provisions of the statute, and assuming that the Court had inherent jurisdiction to issue orders of arrest in disregard of the particular provisions of Section 9-b, the Court would still be without jurisdiction, because there is no proof of any kind of the basic requirements for such an order, as the following considerations will clearly demonstrate.

The two basic facts upon which the District Court proceeded in making the order, and in denying the

motion to vacate, were (1) that the respondent is a fugitive, and (2) that he had stolen or converted to his own use large sums of money belonging to the bankrupt estate.

But upon turning to the record, we find that there is not a scintilla of *proof* of either of these facts. As already stated, the charges are made not by affidavit but in a petition by a person who concededly knew nothing of his own knowledge. We are, therefore, relegated to other sources of information as to proof. Let us, therefore, search the record for any proof that it might contain on these points. And, it is respectfully submitted, such a search will reveal no proof of any kind.

1. *As to the allegation that the respondent is a fugitive.* We have already referred to the fact that the District Court was so misled by the unproved charges in the petition that the respondent was a fugitive that the fact was *assumed* to be true. But that assumption is entirely unwarranted. The petition upon which the order of arrest was made states, *upon information and belief,* that the respondent had been served with a subpoena for his examination issued out of the Eastern District Court; that an attorney representing the respondent denied on his behalf that the respondent had been served, but promised nevertheless to produce him on a certain day; that *prior* to that day, the District Court, presumably proceeding upon the assumption that the respondent had been served, made an order directing him to show cause why he should not be punished for contempt for failure to appear in response to the subpoena; that the order to show cause was never served on the respondent; and that thereupon, the respondent

still not appearing, the Eastern District Court made an order for his arrest similar to the order here in question.

Such are the allegations. Now as to their proof, or their meaning and significance in our connection.

It goes without saying that the failure of the respondent to appear because an attorney had promised to produce him (assuming that he had never been served with the original subpoena) when the District Court refused to accept that attorney's offer to produce him on a certain day and issued an order to show cause to punish for contempt without waiting for his appearance on the promised day, would not make the respondent a fugitive,—even if there were proof that the promise had been made by his authority, of which there is none in the record. His failure to voluntarily appear may, therefore, be eliminated from further consideration. And the question resolves itself into a question as to whether or not there is any proof of the service of the original subpoena—since everything that the Eastern District Court did subsequent to the return day of that subpoena was predicated upon the service of that subpoena, and everything that the Southern District Court did was predicated upon the regularity of the proceedings in the Eastern District Court.

The question, therefore, is: Is there any *proof* of the service of that subpoena? We respectfully submit that there is not a scintilla of evidence of such service, although such proof must have been in the possession of the petitioner, *if it were true that the respondent was actually served with that subpoena.*

There is only one affidavit in the entire record, and that is the affidavit of Nathaniel M. Satloff, printed on Record pages 27-29. An examination of that affidavit will

show that the affiant was a process server in the employ of the attorney for the petitioner, and that both, the original subpoena directed to this respondent as well as the order to show cause why he should not be punished for contempt, were turned over to this affiant, Satloff, for service. Affiant avers that he attempted to serve the order to show cause, but never did serve it. As to the original subpoena, he says *that he turned it over for service to one Greenberg, a process server in his employ, and that Greenberg "effected service" of the same. But there is no affidavit by Greenberg, who is supposed to have "effected service", and not even an explanation why Greenberg's affidavit is not produced.*

The entire structure of contempt of court, writ of *ne exeat,* etc., is thus built up on an affidavit by Satloff that he had given the subpoena to somebody else to serve, with no affidavit from that somebody that the service had actually been made. With no proof of the service of the original subpoena, the entire structure so elaborately built up falls of its own weight with a resounding crash.

It should perhaps be added that although the petition upon which the order of arrest here is based contains many strong words as to alleged hunts for the supposed fugitive by United States Marshals and the William J. Burns Detective Agency, no certificates or affidavits either by Marshals or detective agency operatives are produced. Not that such certificates or affidavits would be of any importance in the absence of proof of the service of the original subpoena. We take it that a person not served by subpoena, and not indicted for any crime, is at liberty to move about the country at his pleasure. Nevertheless, the absence of any such

certificate or affidavit, which could be easily produced if the allegations in the petition were true, is of the greatest significance. Not only in this case, but as showing the great wisdom of our legislature in requiring *proof*, rather than allegations or charges, before an order of arrest can be made.

2. *As to respondent's alleged conversion of funds belonging to the bankrupt estate.* The charges with respect to the respondent's taking, converting, or stealing, of any funds belonging to the bankrupt estate are no better supported by proof than the charge of his being a fugitive—in fact, even less so. For on this point there is some *affirmative* evidence showing the allegations to be untrue.

We must again begin with the fact that the petition is made by a person who knew nothing of his own knowledge. The source of the petitioner's information on this point is not stated, but Mr. Leo J. Linder, the attorney for the petitioner, who presumably prepared the petition, himself made the petition upon which the order of arrest issued in the Eastern District Court was based. That petition is printed in the Record on pages 22-27; and upon turning to that petition, we find that the source of Mr. Linder's information is an unnamed accountant, whom he, Leo J. Linder, attorney for petitioner, employed, presumably for the purpose of examining into the bankrupt estate's accounts and records. But neither on the application for the original order of arrest in the Eastern District Court, nor on the second application for such order of arrest to the same court, nor upon the application for the order of arrest in the Southern District Court, was any affidavit by this

unnamed accountant presented to the Court. Such an affidavit was available, since the accountant was in the employ of the attorney for the petitioner; and its absence, under well-known rules of law, creates the presumption that if produced would *not* have supported the allegations of the petition. But we are not reduced to the necessity of relying on presumptions only, strong as they are, for there is evidence in the Record that these petitions were made recklessly, and at least one of them must be untrue on this particular point. It will be recalled that the original petition, dated January 27th, 1930, was made for the purpose of procuring orders of arrest against the present respondent and one Murray J. Popkin, a son of the respondent; and that the original order of arrest made in the Eastern District Court was directed against both. In that petition, the petitioner said:

> "Your petitioner is informed by the accountant he has employed that Joseph Popkin and Murray J. Popkin, president and secretary, respectively, of the bankrupt corporation, have drawn checks to their personal order in sums aggregating more than $100,000.00; that the greater part of these withdrawals are not accounted for or even entered in any way in the books of account of the bankrupt corporation" (R. 26).

Murray J. Popkin, thus charged with embezzling part of the $100,000, was arrested and examined (R. 16). The Record is significantly silent as to what happened to that embezzler. But ten months later Murray J. Popkin drops out of the picture, and *now* we have the allegation in the present petition that Joseph Popkin alone has withdrawn the same $100,000 and failed to account for it

(R. 5). The accountant employed by counsel for the petitioner had evidently given that counsel erroneous information in January, 1930, either as to the total amount withdrawn or as to who participated in the withdrawals. During the ten months that elapsed between the making of Mr. Linder's petition and the making of Dora Ginsberg's petition, the accountant had ample time to get the exact figures. But we still have the same good round sum of $100,000 (now charged entirely to Joseph Popkin's account) and still no affidavit by any accountant, or any other person who knows anything of these accounts of his own knowledge.

Thus the great embezzlement finds its place beside the great fugitive as part of a story resting largely in the fancy of imaginative petitioners.

3. *As to respondent's intent to leave the district.* Owing to the hue and cry raised by the prolific petitioners with respect to fugitives and embezzlements, which seem to have had their desired effect in the District Court, that Court overlooked the clear provision of Section 9-b that an order such as is here under consideration is not intended to bring a petitioner into a district where he does not reside for the purpose of having him examined there, but is expressly limited to *preventing* the person against whom the order is directed from *leaving the district in which he resides* or has his principal place of business. This statute is not an extradition statute. This was held in *In re Hassenbusch, supra.* Nor was it intended to prevent a man casually in a certain district from leaving that district. The purpose of the statute is clear, and it expressly limits the right to issue an order of arrest to cases where the person proceeded against "is about to leave the dis-

trict in which he resides or has his principal place of business". And it is to that effect that the statute requires *proof* in the form prescribed by it. There is no claim that there is any such proof in the record. If the allegations in the petition which is the basis of the order involved herein mean anything, they mean exactly the reverse of such proof.

4. *As to the authority of petitioner to apply for the order in question in the Southern District.* Before leaving this subject, we respectfully call the attention of the Court to another phase of the subject. Under the rules of law governing the subject, the petitioner herein could not apply to the court which made that order in question without leave from the court in which the bankruptcy was pending and the bankrupt estate was being administered. In pursuance to such rule of law, an order was made by Judge Inch of the Eastern District Court, which is recited in the order under discussion made by Judge Goddard of the Southern District Court, as a basis for his jurisdiction. A glance at Judge Inch's order will show that it authorizes the petitioner to apply to the District Court of the Southern District of New York "for orders *ne exeat*" (R. 10). So long as the applicant and the court proceeded upon the theory that the order made by Judge Goddard *was* a writ of *ne exeat,* the authority thus granted by Judge Inch was sufficient. But now that counsel for the petitioner has abandoned that position and seeks to sustain Judge Goddard's order as an order of arrest, we respectfully submit that the application was without authority, and the papers submitted to the District Court for the Southern District to that extent insufficient.

Before closing this discussion, we must advert to

the assertion made by counsel for the petitioner herein that the allegations as to which we claim there is no proof in the Record were "uncontroverted". Indeed, the absence of proof is so striking that it is only fair to the District Court to assume that it considered the "uncontroverted" character of the allegations of the petition as supplying the missing proof. But that view was clearly erroneous. The application of the respondent in the District Court to vacate the order of arrest was made upon the papers upon which that order was granted. That put him in the position of a demurrant to a complaint, and that is what the Court meant when it said that the allegations were "uncontroverted". That is certainly true in the sense that the allegations of the petition *supported by proof* must be deemed to be uncontroverted, since there is no proof to the contrary. That does not mean, however, that allegations for which there is no proof of any kind are deemed to be uncontroverted or in any way admitted. In the case of a demurrer to a pleading, which need consist only of *allegations*, the rule is well-settled that the admissions do not extend to matter not well pleaded.

United States v. *Ames*, 99 U. S. 35;
Pullman's P. C. Co. v. *M. P. R. Co.*, 115 U. S. 587;
Fogg v. *Blair*, 139 U. S. 118;
Chicago County v. *Sherwood*, 148 U. S. 529;
Chamberlain Mach. Wks. v. *U. S.*, 270 U. S. 347.

Since our statute specifically requires *proof* instead of *allegations*, it is clear that anything that is not supported by proof is not admitted by a motion to vacate

for the insufficiency *which includes insufficiency for lack of the proof required by statute.* Otherwise, we would have the absurd situation that whereas the law specifically requires that there must be proof, and that proof by affidavit of certain facts, the mere presentation of a petition without any proof, throws upon the citizen deprived of his liberty the burden of disproving the allegations.

VI.

The cases relied upon by petitioner herein are neither in point nor authoritative.

When this case was still in the District Court, and counsel for the creditor-petitioner maintained that Judge Goddard's order was a writ of *ne exeat,* certain authorities were cited in support of the right of the creditor to have the so-called non-canonical writ made. These authorities consisted of three cases, decided in the District Courts, and a reference to Collier on Bankruptcy. We shall consider the last-named authority first, for the reason that it throws some light on the theory upon which Judge Goddard made his order and Judge Woolsey denied the motion to vacate the same.

In speaking of the limitations upon the power of the District Court to make orders of arrest, Collier says:

> "The limitations here are important. Such an application can be made only between the time of the filing of the petition and the expiration of one month after the qualification of the trustee; and the bankrupt, if taken into custody, can be

detained only ten days. The affidavits of two persons are necessary; *they must show facts, not opinions*, and must be reasonably conclusive."

1 Collier on Bankruptcy, 390.

This seems to be clear and conclusive as to our learned author's opinion on the subject. But, like all modern authors—who care more for inclusiveness than critical judgment—our author had to find room for the cases hereafter to be noted, and to account for them somehow. Our learned author, therefore, took advantage of the fact that these cases refer to the orders therein made as writs of *ne exeat* to draw a distinction which may be good enough in itself—that is, as distinguishing between writs of *ne exeat* under Section 261 of the Judicial Code and orders of arrest under Section 9-b of the Bankruptcy Act—but which is manifestly insufficient to cover those three cases with the mantle of charity which our learned author evidently intended to spread over them. Although, in fairness to our learned author, it must be said that he does not say that the decisions in question were correct, but merely that it was so *"held"*. In order to understand the distinction our author seeks to make, we must refer to the paragraph preceding the one from which we have already quoted. In that earlier paragraph, Mr. Collier, in speaking of the Bankruptcy Act of 1867, and the provisions made therein with reference to the detention of bankrupts, and seeking to distinguish the same from the provisions of Section 9-b of the present Bankruptcy Act, says:

"The warrant and its purpose were more like the writ of *ne exeat*, referred to in the next paragraph. The present section is, however, *for a very different purpose.*"

Then, having discussed the provisions for orders of arrest under Section 9-b of the present Act, and having indicated the importance of its limitation as shown in the quotation first herein made from his work, Collier proceeds:

> "The similarity between the detention here authorized and that made effective through the writ of *ne exeat* will be recognized. The latter is, however, not limited to a detention for the purpose of examination. It has been *held* that a court of bankruptcy may, under the broad powers conferred by sec. 2 (15) grant *such a writ.*"

And a footnote to this passage shows that the "held" refers to the cases of *Lipke, Cohen,* and *Berkowitz,* relied on in the courts below for the sustaining of the order in question herein. Several things are made clear upon a reading of the two paragraphs in which Collier treats of the entire subject (1 Collier on Bankruptcy, 190-191):

First: That in Collier's own opinion no such order of arrest as is here under consideration could be issued under the provisions of Section 9-b of the present Bankruptcy Act.

Second: That Mr. Collier does not say that Section 2 (15) of the present Act in any way modifies the provisions of Section 9-b, or in any way enlarges upon the powers granted by *that* section. And a reading of the entire text leads to the conclusion that his own opinion is to the contrary.

Third: That he reports the fact that certain things have been *held* without taking responsibility for the correctness of these holdings.

Fourth: That in his opinion the only way in which what was held in *Lipke, Cohen* and *Berkowitz,* can be accounted for, is to hold that they were writs of *ne exeat,* and that the holding in those cases was to the effect that Section 2, subd. 15 of the present Bankruptcy Act permits the issuance of writs of *ne exeat* in addition to the *orders of arrest* provided for by Section 9-b.

It is, therefore, clear that Collier cannot be quoted as authority for the correctness of the practice resorted to by the District Court in the case at bar, but that on the contrary, under his unqualified language the order involved herein was clearly illegal; and that the doctrine advanced in explanation of what has been held is merely reported by him as a fact, for whatever it is worth, in order to make his work all inclusive.

As to the doctrine itself, as expounded in those three cases, it need hardly be said, after what has already been said, that it is entirely untenable and utterly mischievous. It would be bad enough to say that with no provision in the Bankruptcy Act itself for the writ of *ne exeat,* such a writ may be issued under the provisions of Section 2, subd. 15 thereof, although the subject of detention is specifically and with great care and circumspection treated in the Bankruptcy Act in another section which hedges the power about with very important, not to say extraordinary, limitations. But the contention becomes unthinkable when we bear in mind that the issuance of writs of *ne exeat* is itself covered by another statute which also provides important limitations upon the power to issue that writ, and that the real contention here is, that an order of arrest may be made which is *neither* an order of arrest under the provisions of Section 9-b of the Bankruptcy Act, *nor* a

writ of *ne exeat* under Section 261 of the Judicial Code, and is issued without complying with *either* section, and, in fact, *in defiance of the provisions of both statutes.*

Before leaving the discussion of the three cases referred to, it should be noted that the *Cohen* case was decided on the authority of the *Lipke* case, and that the *Berkowitz* case was decided on the authority of the two first-mentioned cases and one other case that does not apply, practically without discussion.

In disposing of this point summarily, the District Court said in the *Berkowitz* case:

> "Upon the authority of Bankr. Act July 1, 1898, c. 541, sec. 2, subd. 15, 30 Stat. 546, sec. 716, Rev. St. U. S., *In re Lipke,* 3 Am. Bankr. Rep. 569, *In re Cohen,* 14 Am. Bankr. Rep. 355, and *In re Fleischer,* 18 Am. Bankr. Rep. 194, I have concluded that the order ought not to be vacated."
>
> *In re Berkowitz,* 173 Fed. 1012.

An examination of the *Fleischer* case referred to will reveal the fact that it is utterly irrelevant to the question involved either in our case or in the *Berkowitz* case, and the reference to that case is additional proof that the learned judge who decided the *Berkowitz* case did not give the subject the serious consideration which it deserves.

The *Fleischer* case was decided by Judge Hough of the Southern District of New York, and it merely held that an alleged bankrupt is subject to examination under Section 21a before adjudication. Section 1, subd. 4 of the Bankruptcy Act specifically says that the word

"bankrupt" includes an "alleged bankrupt". It is, therefore, clear that under the provisions of Section 21a, a bankrupt can be examined before adjudication and while his bankruptcy is merely "alleged". This was not disputed by the learned counsel who contested the right of the creditors to examine the alleged bankrupt. But the astute attorneys for the alleged bankrupt in that case raised the point that while the "alleged bankrupt" was a "bankrupt" within the provisions of the Bankruptcy Law, his estate was not "in process of administration" within the provisions of Section 21a. This contention was overruled by Judge Hough on the ground, which is indisputable, that from the moment a petition in bankruptcy is filed the estate of the alleged bankrupt passes to the court, which has a right to appoint a receiver who administers it on behalf of the court.

Yet this case was considered in the *Berkowitz* case of equal authority with the *Lipke* and *Cohen* cases on the question as to whether or not a writ of *ne exeat* may issue out of the Bankruptcy Court under the provisions of Section 2, subd. 15, in defiance of Section 9-b of the Bankruptcy Act and of Section 261 of the Judicial Code. And, as far as logic and legal principle is concerned, there can be no disputing the fact that the *Lipke* and *Cohen* cases are no better authority for the practice than is the *Fleischer* case.

Three other cases have been cited as authority for the proposition that Section 2, subd. 15, has conferred upon the Bankruptcy Courts the authority which is needed to sustain the order of arrest in question herein. These three cases are *In re Basch,* 97 Fed. Rep. 761; *In re Russell,* 101 Fed. Rep. 248; and, *In re Jersey Island Packing Co.,* 138 Fed. Rep. 625.

The last-mentioned case has not the slightest application to the case at bar. That was an order to restrain the treasurer of a bankrupt corporation from proceeding with the sale of the corporation's property under a trust deed, held by the Court to be a mortgage and claimed to have been issued in fraud of the corporation and its creditors. It should be remembered in this connection that express provision is made by the Bankruptcy Act for the enjoining of suits by third persons against the bankrupt. The proposed sale was clearly in the nature of a foreclosure action, even though the courts were not being resorted to; and it could certainly be restrained on that ground. Section 2, subd. 15, is referred to only incidentally, and its effect in cases where the subject is specifically covered by other provisions is not even touched upon. The real point decided in the *Basch* case can be gathered from the following paragraph of the opinion in that case:

> "The stay of suits against the bankrupt pending the bankrupt proceedings, is absolutely necessary to give effect to the bankruptcy act. Section 11 expressly extends the power to stay proceedings to suits even that were commenced before the petition was filed; and this in connection with section 2 (15), necessarily includes suits on provable debts commenced after the petition was filed and while the bankruptcy proceedings are pending, *as the greater power includes the less.*"
>
> *In re Basch*, 97 Fed. Rep. 761.

It is clear that that case was decided upon a theory wholly inapplicable to the case at bar. It goes, of course, without saying that the greater power includes the less.

But no one has ever heard of the proposition that a power expressly limited by statute is in fact unlimited.

The *Russell* case certainly does not lend itself for use as support for the extraordinary doctrine contended for on behalf of the petitioner herein. Although that case was decided in 1900, it seems to have arisen in 1889 and was, therefore, governed by the Bankruptcy Act of 1867. No reference is made in the opinion in that case to Section 2, subd. 15, of the present Bankruptcy Act, as it could not very well have been. Nor is there anything else in that case which in anyway lends itself to the doctrine contended for on behalf of the petitioner herein. The gist of the decision in that case is contained in the following passage, with which the opinion in that case concludes:

> "Authority to courts of bankruptcy to protect the property in their custody from such interference would seem to be specifically conferred by that provision of section 2 of the act permitting them to make such orders and issue such processes as may be necessary for enforcing their jurisdiction. The prohibition of section 720 of the Revised Statutes against enjoining the proceedings of a state court does not apply when any law relating to bankruptcy authorizes an injunction, nor does it when the proceedings sought to be enjoined have been commenced after the jurisdiction of the federal court has attached. *Fish* v. *Railroad Co.*, 10 Blatchf. 518, Fed. Cas. No. 4, 830; *French* v. *Hay*, 22 Wall. 250, 22 L. Ed. 857; *Dietzsch* v. *Hindekoper*, 103 U. S. 494, 26 L. Ed. 497.
>
> We conclude that the order under review, so far as it stayed the prosecution of the replevin

action, was properly made, and that, unless leave is obtained by the court of bankruptcy, the Machinists Supply Company must bring its action in that court. By clause 'c' of section 19 of the bankrupt act, it is entitled to a trial by jury. In *Re Bandonie,* we pointed out that, in the absence of provisions to the contrary in the act, *it is to be presumed that congress intended the ordinary procedure of courts of law or equity, according to the nature of the controversy, should be observed.* The order under review, so far as it undertook to deprive the Machinists' Supply Company of the right to be heard in a plenary suit by a reference of the controversy to a referee, was an erroneous exercise of power, and to that extent should be reversed with costs."

In re Russell, 101 Fed. Rep. 248.

It seems that it is the first part of this passage that is claimed as authority by the other side. What is there stated is clearly inapplicable to the case at bar. On the other hand, the last paragraph seems to us to be strongly opposed to the latitudinarian contentions advanced in support of the order of arrest issued herein, and to be, if anything, an authority on behalf of the views expressed in this brief.

Before closing this brief, we also beg to respectfully call attention to the language of Judge Choate in the case of *In re Hale,* 11 Fed. Cases 180. Although that case was decided under the Bankruptcy Act of 1867, the principles laid down by Judge Choate are as applicable to the present Bankruptcy Act as they were to the older one, since they merely summarize principles of law

which are basic in Anglo-Saxon jurisprudence. Judge Choate said:

> "The only power to arrest the bankrupt *expressly conferred* upon the Court by the statute is that given in Section 5024, which, in certain cases, authorizes the arrest of the alleged bankrupt *in an involuntary case* and the holding of him in custody or under bail until the decision of the Court * * * that is until the further order of the Court * * *. The power of arrest, therefore, *in any other case* must be implied from some other grant of power contained in the statute, or must be implied because it is essential to the proper exercise by the Court of the powers granted * * *. It can hardly be doubted that so great a power practically reviving imprisonment for debt and touching so seriously the liberty of a very large class of citizens, would, if intended to be given have been given expressly and not left to be inferred merely from the grant of other powers, and that if given, its exercise should have been *carefully limited* by the Act to prevent hardships and abuse. *The express grant of the power* in one case shows that the attention of the framers of the law was called to the subject and they are silent as to all other cases. This raises a *presumption* of some strength against the existence of *the power in other cases* * * * and the fact that no provision has been made * * * for a *warrant of arrest in any other cases than that expressly provided for in the Act* indicate the opinion of the Supreme Court that no such remedy is available."

In re Hale, 11 Fed. Cases 180 (No. 5911).

CONCLUSION.

The order of arrest made by the District Court of the Southern District of New York was clearly unwarranted and without jurisdiction: and the order of the Circuit Court of Appeals for the Second Circuit reversing that order which denied the motion to vacate, was, therefore, clearly right. The order appealed from should, therefore, be affirmed.

Respectfully submitted,

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APPENDIX.

The Bankruptcy Act of 1898, as amended (11 U. S. C. A.), provides in part as follows:

"Sec. 1 (4) * * * 'bankrupt' shall include a person against whom an involuntary petition * * * has been filed or who has filed a voluntary petition, or who has been adjudged a bankrupt.

Section 2. That the Courts of Bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made Courts of Bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Section 7, Subdivision a. The bankrupt shall * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the

conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

Section 9, Subdivision b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Section 21, Subdivision a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *"

Section 261 of the Judicial Code (28 U. S. C. A. 376) provides as follows:

> "*Writs of ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any District Judge, in cases where they might be granted by the District Court of which he is a Judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the Court or Judge granting the same that the *defendant* designs quickly to depart from the United States." (Italics ours.)